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2
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

3 IN RE: TERRORIST ATTACKS ON
SEPTEMBER 11, 2001

03 MD 01570 GBD SN

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8 May 13, 2019
9 11:00 a.m.

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11 Before:

12 HON. SARAH NETBURN,

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14 U.S. Magistrate Judge

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1 (Teleconference in Open Court)

2 THE COURT: Good morning, everybody. Please be
3 seated.

4 (Case called)

5 THE COURT: I believe we have Mr. Kry from MoLoLamken
6 on the phone. Is that correct?

7 MR. KRY: Yes, your Honor.

8 THE COURT: Welcome. Welcome to all of the people who
9 are here in the gallery. I am always happy to have you in the
10 courthouse and the courtroom, so welcome.

11 The purpose of today's conference is one of
12 scheduling. So I have a letter from April 16th that was
13 updating me on the status of the FBI production, and I believe
14 that the FBI and the plaintiffs' executive committee have
15 differing views how we should proceed. I understand from this
16 letter that the plaintiffs' executive committee intends to file
17 one or more motions in connection with Department of Justice's
18 production.

19 Mr. Pounian, you will be taking the heat on this?

20 MR. POUNIAN: Yes, your Honor, at this point. Mr.
21 Carter is also going to have some things to say.

22 THE COURT: Make sure the microphone is close enough
23 so everyone in the room can hear.

24 MR. POUNIAN: We asked for this hearing because we
25 reached an impasse for the first time with the FBI regarding

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1 four witnesses that we requested documents regarding four Saudi
2 government employees who had ties to al-Bayoumi and al-Thumairy
3 in Southern California in the Year 2000.

4 We must bring this motion to compel with regard to
5 those four Saudi government employees as to whom we requested
6 documents, but there is also another question, your Honor, that
7 has been raised that seems to be percolating in the case now.
8 There is a serious question that we have as to whether the FBI
9 intends to produce any documents regarding the Saudi government
10 employees who worked with al-Bayoumi and al-Thumairy to provide
11 assistance to the 911 hijackers.

12 I wanted to raise with your Honor the various issues
13 that we see that are now coming to the fore in the case because
14 we reached a point where there are potential impasses that are
15 about to happen, and we need to hear from the FBI regarding
16 those. We feel like there has been a lot of delay in the case,
17 delay in terms of a response on certain key issues in the case,
18 first and foremost of which is the 2012 FBI report.

19 If I may, your Honor, if I could pass this up to the
20 court?

21 THE COURT: This is the report that was referenced
22 when we appeared together and there was a question whether it
23 was going to be produced in an unredacted form?

24 MR. POUNIAN: That's correct, your Honor. It is on
25 the third tab, the tab of this group of documents. Your

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Honor's familiar with this report. We had discussed it before, and if we go to the third tab, there is a document, it is a four-page document, and on the third page is a synopsis of the subfile investigation, your Honor. The name of that subfile investigation is blank. It is classified, and on this page it refers to that subfile investigation name three times.

We're not interested in the name, your Honor, but we are interested in the particular information regarding this investigation, and it says the main subjects of this investigation, which is any individuals known to have provided substantial assistance to the hijackers. The name of the individuals is al-Thumairy, al-Bayoumi, who your Honor is already familiar with, and a third and possibly fourth person, so there is a third man there that is listed that is the subject of our discovery. We have been asking for over a year for an unredacted copy of this report.

On the final page of the document and in the very final paragraph, it has the information regarding this third man as to whom the information is still being withheld from production.

It says that this third person had some contacts with al-Bayoumi, and also there is evidence that this person tasked al-Thumairy to meet with assisting the hijackers. We believe, your Honor, this third person is a Saudi government official, superior to al-Thumairy and al-Bayoumi, and we have been asking

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1 for this document for over a year, as I said.

2 THE COURT: May I stop you for a second. You said,
3 "We're not interested in the name." What name is it you're not
4 interested in?

5 MR. POUNIAN: The name of the investigation. They
6 classified, on Page 3 it says synopsis of -- blank. That is
7 the name of whatever the FBI has assigned to this particular
8 investigation of Saudi government officials who provided
9 assistance to the hijackers. That is the code name, but we are
10 not asking for the code name. We're asking for the
11 information.

12 THE COURT: Thank you.

13 MR. POUNIAN: In the final paragraph I said we have
14 got the new copy of this document just a week ago from the FBI.
15 They produced an interim version of this to us, and in the
16 interim version there are essentially no changes from the
17 document that is before your Honor right now.

18 They have made on this final page, on the final key
19 page which provides the information regarding this third man,
20 there is no additional information that has been provided by
21 the FBI.

22 Now they have told us that this is an interim decision
23 that they've made and that they're waiting to make a final
24 decision, but the things they're citing that they need to make
25 a final decision on are approvals from a foreign government,

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1 and the only things that require approval in this document from
2 a foreign government have nothing to do with the final page of
3 the document. There are no approvals necessary. We know from
4 the codes on this document there are no approvals necessary
5 from a foreign government to release any of this information.

6 The decision is solely the decision of the FBI's, and
7 they have had over a year to make the decision, and we're still
8 waiting for that decision, and if the decision is no, we're not
9 going to release the information, we want to know that as soon
10 as possible so we can file a motion on this in addition to
11 those four other employees that I mentioned, your Honor, as to
12 whom they will not release any documents.

13 If I could turn, your Honor, to those four employees,
14 they were all Ministry of Islamic Affairs officials who worked,
15 who were in California and worked, one of whom was a superior
16 to al-Thumairy, three of whom worked under al-Thumairy and all
17 four of them had specific ties to al-Bayoumi during the key
18 period of time in late 1999 and 2000.

19 One of them was a superior of al-Thumairy named
20 al-Jraithen, who your Honor has heard about. He is the
21 gentleman who checked into a hotel with al-Bayoumi. He met up
22 with al-Bayoumi and checked into a hotel in December 1999,
23 three weeks before the hijackers arrived, and that was a hotel
24 a block away from the King Fahad Mosque where al-Thumairy
25 installed by Saudi Arabia as the Imam.

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1 We are interested in getting the documents the FBI has
2 as to al-Jraithen. There are two other gentlemen part of this
3 group of four. There is Al-Sudairy, who your Honor has already
4 heard about before, and they worked under al-Thumairy and they
5 also had moved to San Diego during the time of the relevant
6 events where they were assisted by al-Bayoumi and they moved
7 into the same rooming house that the hijackers lived in in San
8 Diego.

9 So we have requested this information. The FBI has
10 completely refused to produce any documents regarding the four
11 individuals. Your Honor, there are other questions that we
12 have in addition to these four. We have asked for documents
13 regarding two officials at the embassy. One is Ahmed
14 al-Jarrah, and the other is Kalib al-Sowailem, and we have
15 questions. We have not seen any documents. They don't seem to
16 have any objection as to those two officials, who both had
17 contacts with al-Thumairy and al-Bayoumi. We haven't heard any
18 objection yet.

19 However, we haven't seen any of the key documents that
20 we would expect to find from the FBI in this case and we're
21 waiting. So we need to know are they going to produce those
22 documents regarding government officials?

23 In addition, there are other documents. This is an
24 investigation. The code name investigation is about Saudi
25 government officials, about al-Thumairy and this third man.

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1 This is a 1912 document. There are documents from each year
2 after that, not exactly like this document, but they're reports
3 that are prepared. There are trip reports and other
4 analytic-type documents that are ordinarily prepared by the FBI
5 in an investigation such as this. None of them have yet been
6 provided, and we don't even know whether they're in the
7 pipeline coming out from the FBI, whether they're reviewing
8 them.

9 So we need to make a motion about this, need a
10 straight answer from the FBI on the to 2012 report, whether
11 they'll going to release it or not, the final page, the key
12 information, and what is going on with the other embassy
13 employees and what is also going on with these other analytic
14 documents, other reports that the FBI is holding. That is the
15 basic point, your Honor. Thank you.

16 THE COURT: Thank you.

17 MR. CARTER: Just a few points.

18 Mr. Pounian has given you a lot of the specifics of
19 where we are now. I certainly want to take a step back because
20 I think this is dropped in the court's lap without a whole lot
21 of context. The background of this, the original FBI
22 investigation was the Pentagon Twin Towers bombing
23 investigation. Within the course of that investigation, the
24 FBI began in the first instance looking at al-Bayoumi
25 al-Thumairy and others.

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Now, we would expect, based on normal FBI procedures, that sub-files would have been created within the Penttbom Investigation for subjects such as al-Bayoumi and al-Thumairy. Fast forward to 2007. The FBI opened a special subfile investigation to focus on whether or not the circle of conspirators who provided support to Alzamari and al-Thumairy, the hijackers, may have been broader than originally suspected.

We know about the subfile investigation, or first learned about it from a report called the 911 Review Commission Report that was issued in 2015. It explains specifically that this was an investigation focused on the circle of conspirators who helped Alzamari in New York, and it identifies a number of people who are of high relevance to that investigation, specifically al-Bayoumi, al-Thumairy and others.

And to the point that Mr. Pounian just made in describing why Mr. al-Bayoumi is significant in the context of the subfile investigation, it specifically notes he assisted Alzamari as well as al-Sadham and al-Sudairy during respective times in San Diego. From this report -- and you have this at Tab 2, your Honor -- from this report we know that al-Sadham and al-Sudairy are relevant actors within the context of this subfile investigation based on their engagements with al-Bayoumi.

The 911 Review Commission Report, in turn, included a footnote referencing the 2012 summary report that your Honor

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1 has before you, and at that time all we knew about the summary
2 report was that it included a specific quote that al-Thumairy
3 had immediately assigned a person to take care of Alzamari and
4 al-Sudairy when they arrived in the United States, which was a
5 significant data point, advancement of the investigation now
6 having al-Thumairy identified in that way.

7 The 2012 summary report was then, your Honor, released
8 in 2016 in redacted form in response to a Touhy FOIA request
9 from a journalist. It then included the details Mr. Pounian
10 has described of both al-Bayoumi, al-Thumairy and video who
11 tasked the hijackers are known to have provided substantial
12 assistance.

13 That all leads us and led up to the issuance of the
14 five plaintiffs of the subpoena. We issued the subpoena within
15 a handful of days within the court's March 28, 2018 decision.
16 The subpoena included 10 demands. Four of those demands were
17 for specifically identified documents, individual documents.
18 One was the 2012 summary report. Six of the remaining demands
19 sought categories of documents, mostly documents from either
20 the Penttbom file, the subfile or other FBI investigative files
21 relating to al-Bayoumi, al-Thumairy, the King Fahad Mosque
22 where the hijackers received the assistance, al-Sowailem and a
23 few other folks.

24 In response, the FBI told us that this is far too
25 broad, we could never possibly respond to this, and we entered

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1 into a series of negotiations where we attempted to modify the
2 subpoena down. All of the modifications we offered were
3 essentially unsatisfactory to the FBI and Department of
4 Justice. What the FBI instead proposed, they would engage in a
5 search for a subset of core documents relevant to the inquiry
6 described in Pages 18 to 23 of the Court's March 28, 2018
7 decision.

8 We had considerable apprehension about that at the
9 time till last summer when we were last discussing it because
10 it is murky to us what exactly was happening. We don't know
11 the criteria they are using to conduct the searches. We are
12 not entirely clear what repositories are being searched. We
13 are not really clear on the criteria that are being used to
14 assess whether or not documents are relevant to the inquiry and
15 the court's decision. We don't believe our discovery on the
16 FBI is limited to the scope of discovery authorized of the
17 kingdom under the Foreign Sovereign Immunities Act, a very
18 different consideration.

19 We reached an impasse with regard to some specific
20 documents and people that we know of we asked the FBI for. We
21 likely also are going to be seeking some clarification about a
22 few other issues.

23 One, we need some clarity about the methodology that
24 the FBI is using to conduct these searches so we can understand
25 a little bit better what it is using for search terms, how it

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1 is going about identifying documents they produce so us, so
2 they have some capacity to challenge any deficiencies in
3 methodologies being employed.

4 We need to know whether or not all of the relevant
5 records related to al-Bayoumi, al-Thumairy and other principals
6 were migrated over from the original Penttbom file to the
7 subfile. We understand the FBI is looking essentially in the
8 subfile. If a lot of stuff was left behind in the Penttbom
9 investigation, there is potential highly relevant information
10 is being excluded.

11 We know need to know where the FBI stands in this
12 process with some particularity. They have identified an
13 approach that they were willing to undertake. We just need to
14 know are searches still ongoing? How many documents are still
15 slated for review? And we need to have some sense of a
16 timeline for the FBI to complete its process because at the
17 end, the likelihood is that we're going to have some
18 disagreements potentially about objections. The FBI has
19 asserted as basis for withholding documents, and we need to get
20 to a point in the process to litigate those as well.

21 We have the specific issues we reached impasse on now,
22 and also in the backdrop we have some of these questions about
23 methodology, timeline on those related issues we need to get
24 before the court. Thank your Honor.

25 THE COURT: Thank you, Mr. Carter.

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1 MS. NORMAND: Good morning, your Honor.

2 I think I would also like to start by stepping back a
3 bit, and I appreciate that counsel pointed the court to the
4 subpoena itself. It did seek basically 10 categories of
5 records, one of which was any and all records referring or
6 related to the work and investigation of the subfile team.

7 So while they did seek some specific records, they
8 sought an extraordinarily broad amount of records. As we had
9 indicated to the court and to the plaintiffs previously, the
10 subfile investigation is one that involves multiple subjects
11 and over a thousand serials, which is a term used to describe a
12 file which may, in turn, contain attachments. So we're talking
13 about an extraordinarily broad request.

14 As counsel also indicated, the investigation is a
15 classified investigation. Not only the name of the
16 investigation, but many of the subjects and the FBI's
17 activities in relation to that investigation are classified.
18 This really is an extraordinary request, that it is not an
19 ordinary civil discovery demand.

20 In response to the subpoena in May, we identified in a
21 lengthy document our objections to the subpoena and to the
22 Touhy request and provided an interim response. We did have
23 some discussions in which we asked for plaintiffs to
24 significantly narrow their request. They largely declined to
25 narrow the request, and so what the FBI proceeded to do was to

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1 identify a subset of records that the FBI believed to be
2 potentially relevant to the narrow issues on which the court
3 has authorized limited jurisdictional discovery of the Kingdom.

4 Those core records, as we sometimes call them,
5 included the 2012 report, it included portions of other
6 identified reports in the subpoena that pertain to al-Bayoumi
7 and al-Thumairy. It identified, it included various interview
8 reports, other kinds of records of a more analytical nature,
9 all of which were tied to the specific questions on which the
10 court had authorized limited jurisdictional discovery, and we
11 have been clear about that to the plaintiffs throughout.

12 The United States Attorney asked the FBI to conduct a
13 privileged and declassification review of those four records,
14 which has been ongoing since the fall. We have a team of
15 individuals from FBI headquarters as well as field personnel,
16 assisted by the U.S. Attorney's Office, that has been reviewing
17 documents line-by-line.

18 Most if not all of the records are classified records,
19 and so the materials that have been produced have had to be
20 reviewed line-by-line and produced through a process that
21 requires multiple layers of review to ultimately sign off by
22 through the declassification review procedures of the FBI.

23 We have now produced four tranches of records. The
24 first began in I believe it was November, and the most recent
25 tranche of records was produced on May 1st. So far we have

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produced 364 pages of records in redacted form. We withheld -- we, the FBI -- has withheld eight records in full. We provided a privilege log with regard to the records that are withheld in full, and the records that have been produced in redacted form are coded with an accompanying heat that identifies the basis for the redactions.

As for timing, we expect at least two further tranches of records. It may be more than two, but there are essentially two categories of records that remain to be processed. The first is the remaining of the core records. Those include certain evidentiary materials that the plaintiffs have sought. They include portions of a joint intelligence report, an OIG report, the portions of those reports that pertain to the matters on which the court has authorized jurisdictional discovery and some other records of a more analytical nature.

We don't have a firm time-frame to finish production, but the FBI is going to do its best to complete review of those records within 60 days. That is our firm goal. Sometimes things come up that make it more difficult to do that. We have learned that throughout this process.

I should add that some of the records involve equities of other government agencies or foreign governments where coordination is required for those outside of the FBI, and that can take time. That said, the FBI is really hoping to complete its review of the core records, the subset of records, within

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1 60 days.

2 The second category of records remain to be processed
3 are banking and phone records. With the court's permission, I
4 am going to let Ms. Vargas address that category of records and
5 our plan for those.

6 MS. VARGAS: Good morning, your Honor.

7 Plaintiffs have also requested, as Ms. Normand alluded
8 to, phone and banking records for certain individuals. We are
9 close to the end of our collection process for those records.
10 To date, we have gathered approximately 2500 pages of
11 responsive phone and banking records which we believe represent
12 the bulk of the records. We are still conducting some limited
13 supplemental searches in a few locations, but once we have done
14 that, then our search will at that point be complete.

15 It appears that many of these records have been
16 obtained by grand jury subpoena, which raises some
17 complications. Because these are grand jury records, they're
18 subject to the protections of Rule 6(e), and so we're unable to
19 turn those records over without obtaining a Rule 6(e) court
20 order.

21 Rule 6(e) requires that a petition for such an order
22 be filed in the court that originally issued the grand jury
23 subpoena. Because these records were obtained many years ago,
24 it has proven to be a little tricky to determine which courts
25 issued which subpoenas for which records. We have been doing

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1 that analysis, and we have located at least three jurisdictions
2 that have issued grand jury subpoenas with respect to these
3 relevant records, and we are attempting to determine if there
4 are other subpoenas issued, and we hope we will be able to
5 identify all such subpoenas, although ultimately we may not be
6 able to do so.

7 THE COURT: Would it be satisfactory, once you have
8 exhausted your efforts, to get a blanket order from me to
9 protect the FBI in the process more broadly?

10 MS. VARGAS: Yes, your Honor, that is our plan for
11 those records, for which we can't link a particular subpoena to
12 a particular set of records. Then we would hope we could come
13 to your Honor with those records and obtain a Rule 6(e) order
14 even if it's perhaps not exactly the procedure envisioned by
15 Rule 6(e) itself, but at this point that may be the only option
16 available.

17 With respect to the courts that we are are able to
18 identify the issuing jurisdiction, our current plan, if your
19 Honor approves, is to submit motions to transfer the venue of
20 those petitions to this Court pursuant -- and there is a
21 provision in Rule 6 that provides for that, it is Rule
22 6(e)(3)(G).

23 For example, if a grand jury subpoena was issued in
24 the Southern District of California, we can file a petition and
25 a motion to transfer that petition to this Court, since the

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records are sought for use in this judicial proceeding, and that court can then transfer the petition here for your Honor to issue the relevant Rule 6(e) order.

We assume at that point the PECs could support such a motion and file papers in support of why those documents were needed with respect to this litigation, which is a showing obviously the FBI is not in the best position and the plaintiffs are better.

THE COURT: Is that the most expeditious way to file a motion for a transfer of the issue and then have this Court rule on the merits rather than just file a motion in the first instance in the issuing court?

MS. VARGAS: This is what their Rule 6(e) procedures envision. There is a provision in Rule 6(e) that allows for a court to authorize disclosure if the records are needed in aid of a judicial proceeding, but there is a subpart that says if the judicial proceeding is in another jurisdiction, in another court, the court shall transfer the petition to the court which has the judicial proceeding.

I think there are provisions that allow for the originating court to have perhaps an advisory opinion if needed, if there were some issues with the confidentiality that one court wanted to advise the other court, but that is the procedure that is set forth in the rules. That is why we were contemplating proceeding in that fashion.

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1 THE COURT: Thank you. Ms. Vargas, how quickly, if
2 you identified at least three of the core issues, can we get
3 those motions to transfer up and running?

4 MS. VARGAS: Yes, your Honor, we are working on that
5 now, and so we hope to have motion papers fairly shortly, but
6 we are working on that in the short term.

7 THE COURT: They say beauty is in the eye of the
8 beholder. What is your, "fairly shortly"?

9 MS. VARGAS: In the next two weeks we hope to have
10 papers filed.

11 THE COURT: Yes, Ms. Normand.

12 MS. NORMAND: I would like to return to some of the
13 specific matters that Mr. Pounian raised.

14 I guess, first of all, I would begin with the four
15 individuals or perhaps five individuals he has identified. I
16 think it is important to make the point that three of those
17 individuals, as we understand them, Mr. al-Jraithen, Mr.
18 al-Sadham and Mr. al-Sudairy, are individuals as to whom this
19 Court has ruled are not a proper subject of jurisdictional
20 discovery. That was the basis for the FBI's position and is
21 the basis for the FBI's position that further searches for
22 documents related to those individuals are not warranted.

23 From the efficiency's response to the subpoena to the
24 request, we have made it clear that the court's limitations on
25 jurisdictional discovery have guided the FBI's searches, and in

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1 our view it is not proper to ask the FBI or any government
2 agency to search more broadly than the limits of jurisdictional
3 discovery authorized by Judge Daniels and this Court, and that
4 is the basis for the FBI's position that it would not conduct
5 additional searches beyond the core records that it gathered
6 last summer for those individuals.

7 As to the other two, search of those two individuals
8 we understand are among those individuals as to whom the court
9 has permitted discovery or at least there is no dispute as to
10 that, and records concerning those individuals were part of the
11 FBI's search, so the FBI has searched for records concerning
12 those individuals. I will add, I believe the FBI has produced
13 at least one record that refers to one of those individuals,
14 although I don't want to go into detail in court because the
15 documents themselves are subject to a protective order.

16 So that is the government's position, that the scope
17 of discovery from the FBI which, of course, the United States
18 is a sovereign as well, in addition to the foreign sovereigns
19 and the state sovereigns, of course, but that discovery of the
20 FBI should not be broader than discovery of the Kingdom itself.

21 The other piece is the 2012 summary report. As Mr.
22 Pounian indicated, the FBI, at plaintiffs' request, has
23 produced an interim version of that document. It has not yet
24 made a final determination as to the document in part because
25 there is information in the document that has to be coordinated

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1 with a foreign government. Therefore, we don't believe
2 litigation is appropriate at this time with regard to that
3 document, but I would add, Mr. Pounian pointed you to the last
4 page of the document, and I believe the version he has
5 identified is the version that was produced under FOIA.

6 If you look, your Honor, there are codes on this
7 document that reflect the FOIA markings in the litigation per
8 the FOIA matter. They refer to B-1 and B-3. Now I am looking
9 at Page 3 and 4 of this document, and you'll see there are
10 redactions there, B-1 and B-3, on both pages. I believe these
11 are redactions Mr. Pounian has pointed out to the court. Those
12 redactions were litigated in a Freedom of Information Act
13 litigation that followed this FOIA request, and the court in
14 that case upheld the classification and the withholding of that
15 information as properly and currently -- as well as protected
16 from disclosure by the National Security Act, which is a
17 separate statutory protection in addition to classification.

18 That District Court decision is reported at 2017
19 WestLaw 746410, a 2017 decision from the Southern District of
20 Florida. There is currently an appeal pending on various
21 issues in that case, including I believe this document before
22 the 11th Circuit.

23 This is information that another court has previously
24 determined to be properly classified as protected from
25 disclosure by statute. The FBI, nevertheless, reviewed this

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1 document and at least at this time has determined the
2 information is not being declassified. However, I will add
3 that there are additional documents remaining in the last group
4 of core records that pertain to issues that overlap with the
5 2012 report, and our view is that the FBI should be permitted
6 to complete its review of those records, and then to the extent
7 that there is going to be litigation over withholdings
8 potentially to include this information in the 2012 report,
9 that it will be most efficient and most appropriate to wait
10 until the FBI has issued a final determination both as to the
11 2012 report and as to other documents, including the later
12 documents that remain to be reviewed, as I said, the FBI is
13 going to do its best to complete that review within 60 days.

14 Obviously, if there are roadblocks along the way, we
15 can advise the court, but that is the schedule that we envision
16 and we will try our best to articulate.

17 THE COURT: I think everybody is eager to get these
18 issues resolved, everybody in the courtroom.

19 Why would it not be efficient to work on parallel
20 tracks and so that the plaintiffs' executive committee can file
21 their motion? That will be on the assumption that they're not
22 going to be doing anything else. That will give the FBI the
23 benefit of their thinking as well why those documents are
24 necessary. We can schedule a briefing so that their brief is
25 filed before your 60-day deadline, I'll call it, to produce

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1 your final tranche of documents.

2 And then you'll have the opportunity to make a final
3 decision as to what you're producing, and to the extent you're
4 not producing all or some of the documents, you will then file
5 your opposition to the motion. It seems to me rather than wait
6 60 days, then have you say we're not producing everything, and
7 then set a schedule for the PECs, I would rather have them
8 working on this now, under the assumption they have all they're
9 going to get and maybe some of the issues will be mooted by
10 your conduct, but otherwise we'll move forward.

11 MS. NORMAND: I would say two reasons, your Honor:

12 First of all, we haven't yet had any opportunity to
13 meet-and-confer with the plaintiffs regarding -- they haven't
14 met and conferred with us regarding specific withholdings. We
15 obviously understand they're interested in this information
16 from the 2012 report, and certainly we understand why they're
17 interested in that, but as to any other documents that they are
18 interested in, we have not yet had those meet-and-confer
19 sessions. We don't know which documents they intend to
20 challenge the withholding of, which redactions they're
21 concerned with. These are things ordinarily parties would
22 meet-and-confer about before motion practice is filed.

23 Number two, the FBI needs to complete its review, and
24 if the plaintiffs make a motion to compel, we understand that
25 the plaintiffs take the position that the United States would

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1 need to assert the State Secrets Privilege in order to withhold
2 these documents in litigation. We don't necessarily agree with
3 that position. We believe that Touhy regulations and the
4 existing privileges and protections permit the government to
5 withhold the materials pursuant to Touhy regulations.

6 However, if ultimately the government needs to go
7 through that state secrets process, that is a lengthy process.
8 As the court may be aware, the State Secrets Privilege can only
9 be asserted by the head of the agency, which in this case would
10 be the Attorney General is the head of the Department of
11 Justice, of which the FBI is a component.

12 The privilege can only be asserted upon personal
13 consideration by the head of the agency of the documents or
14 information in question. There are procedures in place at the
15 Department of Justice that require, before the Attorney General
16 is to review a state secrets assertion, for a committee to
17 review and sign off on it.

18 Those procedures need to be followed in order to
19 assert the State Secrets Privilege in response to any motion to
20 compel, and those procedures should only be invoked once and
21 not piecemeal. The Attorney General should have an opportunity
22 to review all of the records that are potentially implicated
23 before making a final determination as to any privilege
24 assertion rather than doing it piecemeal.

25 The FBI will not have completed its review until 60

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1 days. That's certainly our goal. We wouldn't be in a position
2 to trigger the State Secrets process with regard to entirety of
3 the records until that review is completed. For those reasons,
4 we think it makes sense to put off a motion to compel until the
5 FBI has completed its process.

6 That said, I do think that there are issues that are
7 probably ripe for the court's consideration now. We believe,
8 for example, that the issues regarding the three individuals
9 who are mentioned, Mr. al-Jraithen and al-Sadham, Mr.
10 al-Sudairy, those are questions of the scope of discovery that
11 has been authorized by the court and its application to the
12 FBI. There the parties have reached an impasse, and to the
13 extent the plaintiffs PEC wish the FBI to conduct additional
14 searches, and the FBI has declined to do that given the court's
15 prior rulings on those individuals, those are issues that we
16 think make sense to brief now.

17 THE COURT: Thank you. Yes, Mr. Pounian.

18 MR. POUNIAN: Your Honor, I believe we got an answer.
19 I figured we would piece through that. I think they're not
20 going to produce the final page of the 2012 report. If that is
21 correct, your Honor, we should bring a motion to compel the
22 production of the final page of the 2012 report.

23 THE COURT: I thought I heard her say they were still
24 undergoing that review. It may ultimately be they're not going
25 to --

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1 MR. POUNIAN: They're undergoing a review because
2 they're getting approvals from a foreign government.

3 THE COURT: Correct.

4 MR. POUNIAN: The codes from the document that relate
5 to a foreign government don't have anything to do with the
6 final page of the document, and I may have -- I think I heard,
7 perhaps we could get an answer right now, are they going to
8 produce the final page unredacted of the 2012 report? That is
9 the question.

10 MS. NORMAND: Your Honor, that information has not
11 been declassified as of now. However, the report has not yet
12 been finally reviewed by the FBI, and so I am not in a position
13 to say the final determination has been made as to any portion
14 of the report that has not been released.

15 THE COURT: Can you answer whether or not the last
16 paragraph on Page 4 of the report, whether or not that, the
17 current status of that that you're awaiting a final, a final
18 decision by the FBI or whether or not you are awaiting a
19 decision by a foreign government?

20 MS. NORMAND: That portion is not related to the
21 foreign government coordination I discussed earlier. The
22 document as a whole has only been released in interim form at
23 plaintiffs' request. Among other things, we are waiting for
24 coordination of the foreign government.

25 THE COURT: But just because the foreign government

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1 hypothetically would say we are fine with you releasing
2 everything, that would not answer the question whether or not
3 you will release the last paragraph, is what Mr. Pounian is
4 most --

5 MS. NORMAND: That's right, that's right.

6 THE COURT: Is it fair to say that you are not
7 intending to release that final paragraph or that it is still
8 an issue for consideration?

9 MS. NORMAND: Your Honor, I cannot say today that a
10 final determination has been made as to that, and the reason
11 is, as I mentioned earlier, there are additional materials that
12 require approval, documents that overlap some of this
13 information, and so I expect that a final determination will be
14 made as to not only this document, but those other materials at
15 the same time. I am not in a position to say that a final
16 determination has been made even as to the last page of the
17 document. That said, I want to be clear, there has been no
18 decision to declassify that information at this time.

19 It may very well be ultimately the information is not
20 produced. I don't want to be unclear about that. I am not in
21 a position to tell the court or the plaintiffs that a final
22 determination has been made as to the document.

23 THE COURT: Is it your understanding -- what you just
24 said to me -- part of the determination whether or not to
25 declassify this report will be informed by decisions about

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1 other documents that are in the final tranche?

2 MS. NORMAND: I believe that is a fair
3 characterization, your Honor, because there are documents in
4 the final tranche that overlap reasonably some of the same
5 issues as this one.

6 THE COURT: Thank you.

7 MR. POUNIAN: Your Honor --

8 THE COURT: You have as much clarity as we can get.

9 MR. POUNIAN: -- I have to note we asked specifically
10 for this document over a year ago. I believe at the first
11 conference with your Honor last May, Mr. Carter spoke about
12 this report. There has been discussions about it for a year,
13 and yet we are now here with an interim version of it and still
14 wanting more detail on an issue that is critical and key and
15 goes right to the heart of the jurisdictional discovery in the
16 case. I don't think we're getting a straight answer at this
17 point, your Honor, but I'll move on to the next issue.

18 Last September after the subpoena, we gave the FBI a
19 list of eight witnesses, eight Saudi government employees as to
20 whom we wanted them to zero in and produce discovery. We gave
21 them certain facts regarding those witnesses, and they started
22 doing that process. They had two tranches in which they
23 provided some information, and then we learned just last month
24 that as to three of the people, we would get nothing. We hear
25 now it is because of your Honor's ruling last November

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1 regarding discovery with regard to the Kingdom.

2 Now, the question is, is there relevant information in
3 the FBI files relevant to this case? The plaintiffs don't have
4 the information. We are seeking discovery from the FBI. The
5 FBI investigated all these individuals. Each one of them has
6 ties to al-Thumairy and al-Bayoumi in California at the key
7 time of the key events. Two of them stayed in the same rooming
8 house with the hijackers.

9 So we believe it is critical to get this discovery,
10 and I understand there is a prior ruling of this Court with
11 regard to the Kingdom that we may seek to reconsider with your
12 Honor, but we need the information from the FBI in part to do
13 that. We don't have any other source of the information other
14 than from the FBI.

15 There is no reason for them to be holding back on a
16 subpoena from the plaintiffs in this case if they have the
17 information and it is relevant to the process here. I can't
18 tell you what is in the files there, but I know that the FBI
19 investigated each one of these three people, al-Souailem and
20 al-Sudairy because they had ties at the critical time.
21 Al-Jraithen came from Saudi Arabia to visit with al-Bayoumi and
22 with al-Thumairy and I believe to make the arrangements for the
23 hijackers to arrive three weeks later in California.

24 I believe it is critical information, and if they have
25 documents about it, we ask them to be produced via a protective

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1 order to protect the information. I don't understand what
2 prejudice there is to the FBI at this point.

3 Also with regard to the documents in this case, Ms.
4 Normand said they're all classified. From what we understand,
5 any document that mentions the name of the code name of the
6 operation is classified automatically. It could be a document
7 about a routine interview of a witness at a hotel. Every
8 document that mentions the code name of the operation is
9 classified automatically. Every document in this subfile
10 investigation of Saudi government officials is necessarily
11 classified simply because of that one title on the top of the
12 document that has the name of the operation on it.

13 Now, the government says they produced 364 pages to
14 date, and it has been over a year, your Honor. The production
15 started, it was delayed and it started in November. We are
16 aware from our own research that the government routinely
17 produces in other litigation 500 pages a month up to 10,000
18 pages a month they can process, the FBI can process in response
19 to other litigation. In the Hillary Clinton email litigation,
20 they produced 500 pages a month, the same for the David
21 Petraeus litigation.

22 Other cases, up to 10,000 per month when there has
23 been a court order imposing that. We still don't know what is
24 in the pipeline, your Honor, and that is what Mr. Carter
25 pointed out earlier that gives us pause because we don't know

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1 exactly what they're going to produce, what they plan, what is
2 on the list.

3 So we have a lot of uncertainty and we're trying to
4 nail down as many things as we can because we don't want the
5 process to keep going and get rolled over into a situation
6 where we are left several months from now and there is a lot of
7 pressure to get things wrapped up when we don't yet have the
8 information and we have got to go to the Attorney General of
9 the United States to have him review documents. We would like
10 to get that done now.

11 THE COURT: It seems to me there are at least two ways
12 to proceed. One way would be to have a short briefing schedule
13 on the question of these three individuals and potentially on
14 the 2012 report. I understand the government hasn't made a
15 final determination, but we can proceed on the assumption that
16 its final determination is the same as its interim
17 determination and seek a ruling on that.

18 Or I think we can do "and/or," we can brief all of the
19 issues in an entire motion to compel. I am talking and
20 thinking at the same time. I guess based on what you just said
21 to me, my proposed schedule that I threw out to Ms. Normand
22 probably doesn't work for you.

23 What I had suggested was you file your motion in 45
24 days, and that will give the government an opportunity to both
25 complete its final tranche and to get the benefit of your

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authorities on some of the legal questions, and then they can respond to the motion. Some issues might be mooted by the production and otherwise they'll just respond to the motion.

I guess the question for you, notwithstanding your desire to move as quickly as possible, which I share, is does it make sense for you to file your full motion to compel until you've received the final production, and if the final production isn't coming for 60 days, then would you rather have this preliminary motion on these individuals and potentially the 2012 report and then set a deadline for production and then turn around for your motion to compel?

MR. POUNIAN: A preliminary motion makes the most sense, your Honor, because if we bring a broad motion to compel now, we're going to be dealing with things we don't know, we are not going to know the range of the production until it is over, so I think there is going to have to be a motion at the end of the production in any event if it is not satisfactory because we don't know, we don't know what documents are in the pipeline.

With regard to these individuals and with regard to the 2012 report, I think we can file a motion, if that's your Honor's decision?

MR. CARTER: Could I add one thing?

I think Mr. Pounian is right, and I think it largely aligns with what Ms. Normand said. There are a range of

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1 objections that the FBI has indicated may be invoked with
2 regard to documents. One is relevancy, which is the basis, as
3 we understand it, for declining to respond to these three
4 individuals. There are potential objections based on
5 invocation of the Law Enforcement Privilege, the burden, and I
6 don't think that we necessarily will have all the architecture
7 around this to address these issues until we get towards the
8 end of the process.

9 What I would believe would be the best course is for
10 us to focus on the specific areas in the past. We may seek
11 leave to address the core methodology issue. One of the
12 reasons we can't file an omnibus motion is we don't understand
13 how they're going about deciding what is a core document that
14 is going to be incorporated into the searches. So I think if
15 we focused on those issues, we will advance the process
16 considerably.

17 THE COURT: How quickly can you file a motion with
18 respect to the three individuals and the report?

19 (Off-the-record discussion)

20 MR. CARTER: I am trying to figure out when we have
21 agreed to be out of the country or a number of us out of the
22 country on depositions. I think right about 30 days from now a
23 number of us will be out of the country.

24 THE COURT: Send a letter to us in the next two days.

25 MR. CARTER: In the 30, 45 days range when we would be

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1 ready from then, your Honor?

2 THE COURT: Okay. I will take my leave from you on
3 that. I expected you to say more like 10 days from now is what
4 I expected you were going to say, so maybe that is not
5 possible, but I think you should be working on these motions
6 now. Who knows what is going to be produced in the final
7 tranche, but you have some sense, I think. You may not be
8 getting everything you want.

9 So we are going to do this in two phases, but I think
10 you're a team of lawyers. People should be working on these
11 motions now so that once the second tranche has been produced
12 and the parties have had an efficient meet-and-confer on that,
13 you can get that motion filed within a matter of weeks as
14 opposed to a matter of months. I think that should be
15 everybody's goal here.

16 So why don't we do the following: If you all can
17 meet-and-confer in the next 24 hours and get me a letter in the
18 next day or two with a proposed schedule for the first motion
19 to compel, which is going to be with respect to the three
20 individuals and the 2012 report, and you all should discuss a
21 briefing schedule. Again my thinking is it should be something
22 like a couple of weeks, a couple of weeks to oppose, and a few
23 days to file any reply, but I'll let you all try and work
24 out -- the summer is coming.

25 MS. NORMAND: Your Honor, we have no objection,

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1 obviously, to the plaintiffs filing on their schedule and the
2 court's schedule, but the government would, if the court is
3 anticipating the government would be potentially serving the
4 State Secrets Privilege in response to the motion to compel the
5 2012 report, that would require significant procedural work for
6 the Department of Justice.

7 It would be difficult and it would really be
8 impossible for us to respond on that two week time-frame if
9 that is what the court is envisioning. We can certainly
10 respond more quickly on the scope questions that the plaintiffs
11 have raised here with regard to the three individuals.

12 THE COURT: Can we do the following, because it sounds
13 like a States Secrets issue may be hung up in the larger
14 tranche and will need to be addressed then. Again I am talking
15 and thinking at the same time, which is never a great idea, but
16 can we hold off on the State Secrets argument, I can rule on
17 the other argument, and then if there is a States Secrets
18 objection, we can deal with that on a later today. It may be
19 they're not entitled to those documents for the reasons I
20 stated, the government is not required to produce them.

21 Is there any efficiency to that?

22 MR. CARTER: Your Honor, information would be provided
23 to us in the context of the State Secrets assertion that would
24 inform our arguments in response to other positions, that would
25 be affidavits coming in that context that provide a certain

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1 level of procedural protection that might inform the overall
2 arguments.

3 We do have some concern about segregating the State
4 Secrets from the other argument. One of the difficulties and
5 frustrations after we served the subpoenaed in April of last
6 year, we emphasized the 2012 report was the highest order of
7 priority in this process.

8 When we were before your Honor last year in October,
9 we were told that it was expected that it would be processed to
10 whatever determination in the second tranche before the end of
11 the year. It has slipped repeatedly, and mostly what we have
12 heard is there is a policy determination that needs to be made
13 with regard to that document. That has been true for a year,
14 and it has also been true to the related documents that
15 concerns the same issues.

16 We would like to get to the point and have the
17 government go through its process to assert whatever grounds it
18 intends to invoke to withhold the document. We think that this
19 issue needs to be elevated up to the ultimate decision-maker
20 sooner rather than later.

21 THE COURT: All right. If you can't agree on the
22 process, send me your competing proposals with respect to these
23 four areas of discovery in that first motion to compel, and
24 I'll issue a ruling. I will wait and see whether you all can
25 work out a proposed schedule. I would rather not wait.

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1 MR. POUNIAN: May I add one more thing.

2 I had a chance to talk with co-counsel, and I think
3 three weeks would be sufficient for us to file the motion.

4 THE COURT: Okay. Let me give you guys an opportunity
5 to speak outside with the government and see if you can come up
6 with a schedule that works for everybody, but I think if we can
7 do it in three weeks, that will be certainly my preference.

8 MS. NORMAND: I ask for clarification. You referred
9 to four areas of discovery. Are you referring to the three
10 individuals and the 2012 report?

11 THE COURT: I am. I am going to order that the
12 government produce that final tranche within 60 days from
13 today. Hopefully, a court order will urge you. I agree the
14 plaintiffs' executive committee that we need to move that
15 process further along.

16 So today is May 13th, so that production will be due
17 on Friday, July 12th. Hopefully that will also help you all in
18 your effort with respect to the second motion that is
19 anticipated. So the plaintiffs' executive committee, to the
20 extent the government feels there has not been adequate
21 meet-and-confer with respect to the other documents that you're
22 seeking, this is also an opportunity to have that conversation
23 as well. It seems you have been speaking, and maybe not with
24 specificity to the government's liking, so you can engage in
25 that process and I'll appreciate that as well.

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1 Anything further?

2 MR. CARTER: No, your Honor.

3 THE COURT: For the public who is here, I want to
4 point this out to you. Behind you is a portrait of Louis
5 Freeh, who has served in many roles. He was a District Judge
6 in this Courthouse and this was his courtroom.

7 He was also the Director of the FBI during that period
8 of time, and so he no longer serves in either capacity. He is
9 a private citizen now doing legal work, but he was an FBI agent
10 and the Director of the FBI and a District Judge, and he was
11 also a former Assistant United States Attorney.

12 I was speaking with somebody about today's conference
13 just generally, and they pointed this out to me and noted that,
14 or told me the story that when Mr. Freeh was a young Assistant
15 United States Attorney, his first trial was in this courtroom.
16 The first person who testified was an FBI agent, it was in this
17 courtroom, and this was his courtroom when he was a District
18 Judge.

19 So he sat at the lawyers' table, he sat at the Judge's
20 Bench, and he sat in the witness box, wherever it is, all in
21 this courtroom. I thought it was appropriate, though it was
22 just coincidental we are having today's conference to talk
23 about FBI's productions in a courtroom where Mr. Freeh spent a
24 lot of his professional career.

25 So I thought I would share all of that with you

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1 because this courthouse has amazing history, and I hope you
2 take advantage of some of the public flyers and other spaces.
3 I know on the 5th floor there is a lot of information you can
4 learn a little bit more about the courthouse, but I thought I
5 would mention it because I was staring at Mr. Freeh and he was
6 staring at me, through that portrait. I thought you would
7 appreciate that story. With that, I will get a letter from the
8 parties in the next 24 to 48 hours and we'll get scheduled
9 going for this. Thank you.

10 (Court adjourned)

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